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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-911

INDUSTRIAL UNION DEPARTMENT, AFL-CIO,
Petitioner,

v.

AMERICAN PETROLEUM INSTITUTE, *et al.*,
Respondents.

No. 78-1036

RAY MARSHALL, SECRETARY OF LABOR,
Petitioner,

v.

AMERICAN PETROLEUM INSTITUTE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER INDUSTRIAL UNION DEPARTMENT, AFL-CIO

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BRIEF FOR PETITIONER INDUSTRIAL UNION DEPARTMENT, AFL-CIO

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a)[1] is reported at 581 F.2d 493. The regulation at issue and the

[1] "Pet. App." refers to the appendix to the petition in No. 78-911. The separate Joint Appendix filed in this Court will be cited herein as "A." The transcript of the rulemaking hearings conducted in 1977 prior to the promulgation of the regulation at issue will be cited as "Tr.", and the exhibits received during the rulemaking proceeding will be cited as "Exh." The full record has been lodged with the Clerk, together with an index to the record which has been prepared by the parties for the Court's convenience.

Secretary of Labor's accompanying statement of reasons for the promulgation of the regulation (Pet. App. 34a-252a) appear at 43 Fed. Reg. 5918-5970.

JURISDICTION

The judgment of the court of appeals (Pet. App. 254a-255a) was entered on October 5, 1978 (A. 37). The petition for a writ of certiorari in No. 78-911 was filed on December 7, 1978, and the petition in No. 78-1036 on December 26, 1978. The petitions were granted and the cases consolidated on February 21, 1979 (A. 38-39). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTION PRESENTED

The Occupational Safety and Health Act grants the Secretary of Labor the authority to adopt standards governing the exposure of working men and women to toxic materials and directs the Secretary to

> set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

The question presented is whether Congress, in enacting this law, intended to preclude the Secretary from promulgating a regulation limiting workers' exposure to a proven carcinogen until such time as substantial evidence becomes available from which to quantify the number of lives that would be saved by the proposed regulation.

STATUTORY PROVISIONS INVOLVED

The Occupational Safety and Health Act of 1970, P.L. 91-596, 84 Stat. 1590, 29 U.S.C. § 651 *et seq.* provides in pertinent part:

§ 2. Congressional statement of findings and declaration of purpose and policy

(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

* * *

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting commerce. . . .

§ 3. Definitions

* * *

(8) the term 'occupational safety and health standard' means a standard which requires conditions or the adoption or use of one or more practices, means, methods, operations, or processes reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

§ 6. Standards

* * *

(b)

* * *

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition

to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

* * *

(f) Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

STATEMENT OF THE CASE

The Statement in the Brief for the Federal Parties adequately sets forth the facts which are relevant to the disposition of this case. We therefore do not present a separate statement of the case.

SUMMARY OF ARGUMENT

A. In enacting the Occupational Safety and Health Act of 1970 (hereinafter "the Act" or "OSHA"), a particular focus of Congressional attention was the problem of occupational exposure to toxic substances. Congress addressed that problem with the knowledge that the nature and extent of the dangers of such exposure were only partially known, and that more complete knowledge was not imminent given the substantial difficulties in securing necessary information and the delay inherent in the required research.

Congress set the substantive course the Secretary is to follow in promulgating standards dealing with toxic substances in § 6(b)(5) of the Act. That section directs the Secretary, subject only to the constraint of feasibility, to promulgate "*the*" standard that "*most* adequately assures," and that "attain[s] . . . the *highest* degree of health and safety protection for the employee." And, § 6(b)(5) requires the Secretary to "assure," as best can be done, that "*no* employee will suffer material impairment . . . even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." Further, the Secretary is to act under § 6(b)(5) on the "best *available* evidence" and the "latest *available* scientific data in the field."

The legislative history of § 6(b)(5) shows that Congress meant exactly what the statutory language says. And, the legislative materials relating to OSHA in general establish that while Congress knew full well that the statute would require American industry to make large outlays of money, the legislative judgment was that the cost of adequate health and safety protection at the workplace should be recognized as a cost of doing business and should be reflected in the market place. No legislator espoused the lower court's theory that the protection of worker health should be compromised on the basis of a cost-benefit assessment.

On the facts found by the Secretary, the standard he promulgated is the one required by § 6(b)(5). Benzene is a known leukemogen, which the "best available evidence" shows to be dangerous at any level, and to which thousands of employees are exposed on a regular basis. The only standard which can provide the "assurance" required by the statute to each of the 30,000 employees who are regularly exposed to airborne benzene, and as a result face a prospect of contracting leukemia, is one which requires that exposure to be reduced to the lowest level feasible.

B. The Court below recognized and did not overturn the

Secretary's finding that "benzene was unsafe at any level and . . . that exposures to lower levels of [benzene] would be safer than exposure to higher levels." The court also acknowledged and did not overturn the Secretary's finding that "risk quantification"—i.e., estimation of the number of lives at stake—"at low exposure levels . . . cannot presently be made." The court nevertheless held that the Secretary is without authority to promulgate this standard until he can provide an "educated estimate" or "quantification" of the number of lives that would be saved, and thus establish a basis for comparison of the costs and benefits of the standard.

The court could not and did not reconcile its holding with the directives of § 6(b)(5). The court apparently believed it was relieved of that burden by § 3(8), a subsection of the Act's "Definitions" provision. But § 3(8) embodies no departure from the mandate of § 6(b)(5). As regards standards regulating toxic substances, § 3(8) can have no meaning different from § 6(b)(5); and, however construed, § 3(8) cannot override the explicit directives set forth in § 6(b)(5).

Further, the court below was wrong in treating § 3(8) as "precisely similar" to provisions of the Consumer Product Safety Act ("CPSA"), and in concluding that because a cost-benefit evaluation is required before a CPSA standard can be promulgated, the same must be true of an OSHA toxic substance standard. There is such a requirement under the CPSA because the language and history of that statute call for it; the language and history of OSHA respecting toxic substance standards lead to the opposite conclusion. That difference is no accident, but stems from the Congressional perception that the problems addressed by the two statutes are different in nature. The problem addressed by CPSA was viewed by Congress as involving a mix of countervailing consumer interests. In § 6(b)(5), Congress had the singular purpose of protecting against worker exposure to toxic substances.

ARGUMENT

Introduction

The Secretary of Labor promulgated the standard presently before this Court regulating occupational exposure to benzene after a lengthy informal rulemaking proceeding,[2] which included extensive public hearings and the development of a comprehensive evidentiary record, reflecting not only the views of all interested parties but the existing body of pertinent scientific knowledge and opinion. The core provision of that standard lowers the maximum permissible exposure level of airborne benzene from 10 parts per million (ppm) as an 8-hour time weighted average, which had been the permissible exposure level under a national consensus standard [3] adopted by the Secretary prior to recognition of benzene's carcinogenic effect (Pet. App. 7a-8a), to 1 ppm,

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[2] The standard setting procedure established in Section 6(b)(2)-(4) of the Act is characteristic of the informal rulemaking contemplated by Section 4 of the Administrative Procedure Act, P.L. 89-554, 80 Stat. 383, 5 U.S.C. § 553. By regulation, however, the Secretary has adopted additional provisions requiring that the "hearing examiner [who presides at the oral hearing] shall provide an opportunity for cross-examination [by all interested parties] on crucial issues" and that "[t]he hearing shall be reported verbatim, and a transcript shall be available to any interested person . . ." (29 CFR § 1911-15(b)(2) & (3)). See generally, *Industrial Union Department* v. *Hodgson*, 499 F.2d 467, 472-474 (D.C. Cir. 1974).

[3] Section 3(9) of the Act defines a "national consensus standard" as:

> any occupational safety and health standard or modification thereof which (1) has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been

the level determined by the Secretary to be the lowest feasible level. The standard was accompanied by a Statement of Reasons setting out, *inter alia*, nine critical findings that frame the legal issue in this case:

(1) "[T]he accumulated evidence is conclusive that benzene exposure is causally related to the induction of leukemia," a deadly cancer, as well as various other serious and sometimes fatal diseases. Pet. App. at 81a.

(2) Hundreds of employees in this country have died of leukemia from occupational exposure to airborne benzene. Pet. App. at 121a-122a. Although the concentrations of ben-

designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

Under § 6(a) of the Act the Secretary was required "as soon as practicable" within the first two years after the Act became effective to promulgate as a legally binding regulation without resort to rulemaking proceedings, "any national consensus standard," unless the Secretary determined that the promulgation of such a standard "would not result in improved safety or health for specifically designated employees."

Congress recognized the defects of the standards that previously had been set by "nationally recognized standards-producing organization[s]" and, accordingly, expected that their use would be short-lived. The House Committee on Education and Labor "determined that . . . the credibility [of these standards] is suspect . . . [because] a private organization is susceptible to the pressures of commercial trade association interests. . . ." (H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. at 18 (1970), reprinted in Committee Print, Legislative History of the Occupational Safety and Health Act of 1970, 92d Cong., 1st Sess. (1971) (hereinafter "Leg. Hist.") at 848). The Senate Committee on Labor and Public Welfare reached a similar conclusion: "Many [national consensus standards] represent merely the lowest common denominator of acceptance by interested private groups" and, as such, "it is essential that [they] be constantly improved and replaced as new knowledge and techniques are developed." (S. Rep. No. 91-1282, 91st Cong., 2d Sess. at 6, Leg. Hist 146).

zene to which those employees were exposed, and the duration of their exposure, cannot be estimated with any certainty, it is likely that the concentrations were for the most part in excess of 10 ppm. Pet. App. at 100a-101a, 104a-105a, 124a.

(3) As respects benzene's leukemogenic effect, there is no level of exposure to benzene which can be considered safe. "From the point of view of choosing a safe level of exposure, therefore, the permissible exposure limit should be set at zero." Pet. App. at 186a. See also Pet. App. at 72a.

(4) Given that until very recently occupational exposure to airborne benzene had been at levels which, while seldom measured, were generally higher than 10 ppm, and that the "latency period" between initial exposure to benzene and manifestation of leukemia is lengthy, often spanning some 20 years (Pet. App. at 116a), there is not now and there could not be for years to come any direct evidence of the number of employees who have died or can be expected to die from leukemia as a result of occupational exposure to benzene at or below the level of 10 ppm. Pet. App. at 182a-183a.

(5) The available data showing the leukemogenic effects of benzene exposure at levels thought to be in excess of 10 ppm do not show the level and length of exposure of the cases studied, and the data understate, to a degree which cannot be determined, the number of leukemia deaths resulting from such exposure.[4] In addition, there is no satisfac-

[4] The Secretary found that in general, there is an under-reporting of benzene-induced leukemia among workers. Pet. App. at 121a.

One reason is that "cases may never be recorded officially because the families refuse[] permission to release the names of the decedents for fear of loss of [workmen's] compensation. . . ." Pet. App. at 103a. (For example, Dr. Marvin Sakol, a noted hematologist, testified that when Ohio law recognized aplastic anemia, but not leukemia, as a disease which could be occupationally induced, death certificates of workers who had died of leukemia sometimes

tory theory of extrapolation from known carcinogenic effects of a substance at high exposure levels to projected carcinogenic effects of the substance at lower exposure levels. Accordingly, there is no adequate scientific basis for estimating the number of leukemia deaths that would result from exposure to benzene at the level 10 ppm or below:

> [T]here does not exist an adequate scientific basis for establishing the quantitative dose response relationship between exposure to benzene and the induction of leukemia and other blood diseases.

Pet. App. at 160a. See also Pet. App. at 182a-183a.

(6) While "it is impossible to derive any conclusions regarding dose-response relationships for benzene . . . [it] is apparent . . . that a decrease in exposure level and/or duration will result in a decreased risk of leukemia." Pet. App. at 183a.

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stated the cause of death as aplastic anemia so that the family would receive compensation. Tr. 311.)

The Secretary further found that in addition many cases go undiagnosed due to the ease with which leukemia can be confused with certain other diseases. Pet. App. at 121a-122a. Similarly, leukemia can produce fatal complications, such as a heart attack, and often the complications rather than the leukemia will be registered as the cause of death. Tr. 307-308.

The Secretary found that underestimating occured even in the most thorough epidemiological study in the record, the study of Dr. Peter F. Infante of NIOSH. Dr. Infante relied exclusively on death certificates to determine the causes of death in the population he studied which, inevitably, for the reasons noted above, caused him to miss cases of leukemia. See Pet. App. at 102a-103a. The Secretary noted that Dr. Sakol had personally observed several cases of leukemia among the workers Dr. Infante studied and whom Dr. Infante incorrectly assumed had died from other causes since their death certificates made no mention of leukemia. *Id.* See also, Exh. 61; Tr. 308-315. Moreover, Dr. Infante was unable to determine whether or not twenty-five percent of the workers included in the group he studied had died. Yet, he assumed for purposes of the study that every one of them was alive. See Pet. App. at 104a.

(7) There are over 30,000 employees in this country who are regularly exposed to airborne benzene at levels in excess of 1 ppm at their workplaces. Pet. App. at 142a-154a.

(8) Current technology provides feasible means to reduce the permissible exposure level of airborne benzene from 10 ppm to 1 ppm in all industries covered by the standard.

(9) Compliance with the standard would entail first-year operating costs in the range of $187 million to $205 million, recurring annual costs of approximately $34 million, and investment in engineering controls of approximately $266 million. These costs would be spread over more than 20 affected industries, with thousands of individual employers, the greatest impact falling on the larger and more stable industries such as the petroleum refinery, petrochemical, and steel industries, and are well within the ability of the regulated industries to bear. Pet. App. at 134a. See also *id.* at 142a-154a.

The court below, recognizing that under § 6(f) of the Act the factual findings of the Secretary "shall be conclusive if supported by substantial evidence in the record considered as a whole,"[5] did not upset any of these findings. Rather, the court held that these findings are not sufficient to justify the Secretary's decision to reduce the permissible exposure level from 10 ppm to 1 ppm. The court ruled that the Secretary cannot promulgate an occupational health standard without finding a "reasonable[] . . . relationship between expected costs and benefits"; that since the Secretary did not make an "educated estimate[] of the extent of benefits" to be gained by reducing the permissible exposure level, it is "impossible to assess the reasonableness of [that] relationship. . . ."; and, therefore, that unless and until the Secretary can make such an educated estimate of the number of leukemia deaths that would be avoided by the reduction in the permissible exposure level for benzene, he is

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[5] See Pet. App. at 4a-5a.

without statutory authority to promulgate a standard reducing the present permissible exposure level. Pet. App. at 21a.

The court based its analysis on the language in § 3(8), the subsection of the Act's "Definitions" section which states the general definition of an "occupational safety and health standard." Specifically, the court found the requirement of a cost-benefit assessment, entailing an "educated" projection of the number of lives that would be saved, in the inclusion of the words "reasonably necessary or appropriate" in § 3(8). For its interpretation of those words, the court relied upon *Aqua Slide 'N' Dive Corp.* v. *Consumer Product Safety Commission,* 569 F.2d 831 (5th Cir. 1978), a decision interpreting a provision of the Consumer Product Safety Act ("CPSA")[6] containing the words "reasonably necessary."

The pertinent statutory materials, however, are § 6(b)(5), the provision which establishes the substantive criteria for the issuance of toxic substance standards, and its legislative history. Those materials leave no doubt that given the Secretary's findings the Act mandated the standard he issued.

A. Section 6(b)(5) Of OSHA, The Provision Which Governs The Setting Of Toxic Substance Standards, Authorizes The Benzene Standard Promulgated By The Secretary.

1. OSHA represents a Congressional judgment that the human and economic costs[7] of occupational injuries and

[6] P.L. 92-573, 86 Stat. 1207, 15 U.S.C. § 2051 *et seq.*

[7] Section 2(a) of the Act contains this statement of "Findings and Purpose":

> The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

diseases are of such dimension and that the responses of the states to this urgent problem have been so inadequate that comprehensive federal regulation is required. See generally, *Atlas Roofing Co.* v. *Occupational Safety Comm'n,* 430 U.S. 442, 444-445 (1977). Section 2(b) of the Act states the Congressional purpose in unequivocal terms: "The Congress declares it to be its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources. . . ."

A particular focus of Congressional attention was the problem of occupational exposure to toxic substances. Thus, the report of the Senate Committee on Labor and Public Welfare, in recommending Senate passage of the bill, gave particular emphasis to the need to protect employees from workplace exposure to such substances:

> In the field of occupational health the view is particularly bleak, and, due to the lack of information and records, may well be considerably worse than we currently know.
>
> Occupational diseases which first commanded attention at the beginning of the Industrial Revolution are still undermining the health of workers. Substantial numbers, even today, fall victim to ancient industrial poisons such as lead and mercury. Workers in the dusty trades still contract various respiratory diseases. Other materials long in industrial use are only now being discovered to have toxic effects. In addition, technological advances and new processes in American industry have brought numerous new hazards to the workplace. Carcinogenic chemicals, lasers, ultasonic energy, beryllium metal, epoxy resins, pesticides, . . . all present incipient threats to the health of workers. Indeed, new materials and processes are being introduced into industry at a much faster rate than the present meager resources of occupational health can keep up with. It is estimated that every 20 minutes a new and potentially toxic chemical is introduced into industry. New processes and new sources of energy present occupational health problems of unprecedented complexity.

> Recent scientific knowledge points to hitherto unsuspected cause-and-effect relationships between occupational exposures and many of the so-called chronic diseases—cancer, respiratory ailments, allergies, heart disease, and others. In some instances, the relationship appears to be direct: asbestos, ionizing radiation, chromates, and certain dye intermediaries, among others, are directly involved in the genesis of cancer. In other cases, occupational exposures are implicated as contributory factors. The distinction between occupational and non-occupational illnesses is growing increasingly difficult to define.
>
> In 1966-67, the Surgeon General of the United States studied six metropolitan areas, examining 1,700 industrial plants which employed 142,000 workers. The study found that 65 percent of the people were potentially exposed to harmful physical agents, such as severe noise or vibration, or to toxic materials. The Surgeon General further examined controls that were in effect to protect workers from such hazards, and found that only 25 percent of the workers were adequately covered.

S. Rep. No. 91-1282, *supra* at 2-3, Leg. Hist. 142-143. The same concerns were also the focus of attention in the House of Representatives. See H.R. Rep. No. 91-1291, *supra* at 14-16, Leg. Hist. 844-846.[8]

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[8] See also S. Rep. No. 91-1282, *supra* at 19-20 (Leg. Hist. 159-160); Leg. Hist. 1044-1045, 1087, 517, 518-519, 337-339, 445-446, 1084. The Senate Report noted "the lack of information and records" regarding occupational disease (S. Rep. No. 91-1282, *supra* at 2, Leg. Hist. 142), and several legislators echoed the concern voiced by Representative Daniels that "[r]ecords do not exist, on any meaningful basis, regarding the creeping death and disability caused by plant environmental hazards to the health * * * [p]articularly the insidious 'silent killers' such as toxic fumes. . . ." Leg. Hist. 1003. See also Leg. Hist. 1044-1045, 319, 1084, 445, 518, 1087. Congress recognized that information regarding the effects of exposure to toxic substances is particularly difficult to obtain where lengthy latency periods are involved. See Leg. Hist. 1087, 415. And cf. S. Rep. No. 91-1282, *supra* at 4 (Leg. Hist. 144) (possibility of workmen's compensation liability does not induce employers to reduce exposures to toxic substances which have long latency periods, because the eventual disease will seldom be traceable to exposures which occurred many years in the past).

Congress thus understood that the nature and extent of the dangers of occupational exposure to toxic substances were only partially known, and that more complete knowledge was not imminent given the substantial difficulties in securing necessary information and the delay inherent in the required research. Thus informed, Congress chose a standard setting scheme to maximize its overriding goal—employee protection. Section 6(b)(5) sets the substantive course the Secretary is to follow "in promulgating standards dealing with toxic materials or harmful physical agents":

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

It is difficult to conceive of language conveying a more complete dedication to a single purpose. Subject only to the constraint of feasibility—*viz.* what is "capable of being

done, executed or effected; possible of realization''[9]—the Secretary is to promulgate *''the''* standard that *''most* adequately assures,'' and that ''attain[s,] . . . the *highest* degree of health and safety protection for the employee.'' And, § 6(b)(5) requires the Secretary to ''assure,'' as best can be done, that *''no* employee will suffer material impairment . . . even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.''

Congress did not simply pass a statute that promised protection in theory; recognizing the limits of scientific knowledge, § 6(b)(5) directs the Secretary to act on the ''best *available* evidence'' and the ''latest *available* scien-

[9] Webster's Third New International Dictionary 831 (1961). Lower courts have held that in some circumstances a standard may be so ''prohibitively expensive'' as to be infeasible. See *Industrial Union Department* v. *Hodgson*, 499 F.2d 467, 477-481 (1974); *American Iron & Steel Institute* v. *OSHA*, 577 F.2d 825, 832-837 (3rd Cir. 1978), *petitions for cert. pending*, Nos. 78-918, 78-919. The correctness of those rulings, and the precise contours of the feasibility requirement, are not at issue in this case; for in the court of appeals, respondents did not contend that the benzene standard would result in any adverse consequences whatsoever to their businesses. They merely asserted that the costs involved were significant, and that the standard had not been shown to be worth the costs. Both the plain meaning of § 6(b)(5) and its legislative history, which we discuss at pp. 17-23, *infra*, establish that respondents' contentions, even if true, would not render the standard infeasible within the meaning of § 6(b)(5). In this connection, see generally *Industrial Union Department, supra; American Iron & Steel Institute, supra.; Society of The Plastics Industry, Inc.* v. *OSHA*, 509 F.2d 1301, 1308-1309 (2d Cir.), *cert denied*, 421 U.S. 992 (1975). Cf. *Southern Colorado Prestress Co.* v. *OSHRC*, 586 F.2d 1342, 1351 (10th Cir. 1978); *Arkansas-Best Freight Systems, Inc.* v. *OSHRC*, 529 F.2d 649, 653-654 (8th Cir. 1976). But cf. *RMI Co.* v. *Secretary of Labor*, — F.2d —, 7 BNA OSHC 1119 (6th Cir., March 13, 1979); *Turner Co.* v. *Secretary of Labor*, 561 F.2d 82 (7th Cir. 1977).

tific data in the field.'' As the Report of the House Committee on Education and Labor states: ''The Committee feels it is vital that when the Secretary sets an occupational health standard he do so on the basis of the best available professional evidence; it is not intended that the Secretary be paralyzed by debate surrounding diverse medical opinions.'' H.R. Rep. No. 91-1291, *supra* at 18, Leg. Hist. 848. In the words of the late Mr. Justice Clark, sitting by designation on the Court of Appeals for the Second Circuit, ''[u]nder the command of OSHA, it remains the duty of the Secretary to act to protect the workingman, and to act even in circumstances where existing methodology or research is deficient.'' *Society of The Plastics Industry, Inc.* v. *OSHA*, 509 F.2d 1301, 1308 (2d Cir.), *cert. denied*, 421 U.S. 992 (1975). See also *Industrial Union Department* v. *Hodgson*, 499 F.2d 467, 475 (D.C. Cir. 1974); *American Iron & Steel Institute* v. *OSHA*, 577 F.2d 825 (3rd Cir. 1978), *petitions for cert. pending*, Nos. 78-918, 78-919.

2a. The evolution of § 6(b)(5) shows that Congress meant exactly what the statutory language says.

House and Senate consideration of OSHA proceeded on virtually a simultaneous schedule. In the House the Act began as ''the Daniels bill,'' H.R. 16785; in the Senate it was introduced as ''the Williams bill,'' S. 2193. Neither bill contained a provision setting the criteria governing the issuance of toxic substance standards.[10] That provision was added to each measure in committee.[10a]

The provision governing issuance of toxic substance standards reported by the House Committee on Education

[10] See Leg. Hist. 721, 728-732 (Daniels bill), 1, 6-7 (Williams bill).

[10a] The provisions added by the two committees were applicable to all standards (see materials cited in notes 11 and 12, *infra*), but the provisions were ultimately amended to apply solely to standards for toxic substances and harmful physical agents. See note 21, *infra*.

and Labor on July 9, 1970, contained no limitation of "feasibility." The Secretary was to be required to

> set the standard which most adequately assures, on the basis of the best available professional evidence, that no employee will suffer any impairment of health or functional capacity, or diminished life expectancy even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.[11]

On October 6, 1970, the Senate Committee on Labor and Public Welfare reported out virtually the same provision but with one significant change: the words "and feasibly" were added so that the Secretary's mandate was to "set the standard which most adequately *and feasibly* assures. . . ." [12] This additional language resulted from an amendment offered in Committee by Senator Javits, the ranking Republican and a key figure throughout the Senate's deliberation on OSHA.[13] Senator Javits explained that his amendment "was an improvement over the Daniels bill [because the latter as reported out of committee in the House] might be interpreted to require *absolute* health and safety in all cases, regardless of feasibility. . . ." [14]

The Senate Committee report that accompanied S. 2193 made clear its understanding of the added language of feasibility by paraphrasing the bill's language in the following terms:

[11] H.R. Rep. No. 91-1291, *supra* at 4, Leg. Hist. 834.

[12] Leg. Hist. 204, 242.

[13] See e.g., Leg. Hist. 1151.

[14] S. Rep. No. 91-1282, *supra* at 58 (individual views of Senator Javits), Leg. Hist. 197 (emphasis added). Senator Javits described his "feasibility" amendment as an improvement over not only the Daniels bill, but also "the Administration bill which contain[ed] no criteria for standards at all." *Ibid.* That bill, S. 2788, had been introduced by Senator Javits on August 6, 1969. See S. Rep. No. 91-1282 at 5, Leg. Hist. 145. Its provisions regarding the setting of standards appear at Leg. Hist. 31, 36-42.

> [S]tandards should be directed at assuring, *so far as possible*, that no employee will suffer impaired health or functional capacity, or diminished life expectancy, by reason of exposure to the hazard involved, even though such exposure may be over the period of his entire working life." [15]

The "feasibility" language reported by the Committee was refined on the floor of the Senate. Notwithstanding the Javits amendment, several Senators—most notably Senator Dominick, the Nixon Administration spokesman on OSHA, and a prominent force in the ultimate development of the legislation [16]—expressed concern that § 6(b)(5) could nevertheless be read to accomplish what Senator Javits had sought to avoid. Senator Dominick explained (Leg. Hist. 367):

> [Section 6(b)(5)] is inherently confusing and unrealistic. It could be read to require the Secretary to ban all occupations in which there remains *some* risk of injury, impaired health, or life expectancy. In the case of all occupatons, it will be impossible to eliminate all risks to safety and health. Thus, the present criteria could, if literally applied, close every business in this nation. In addition, in many cases, the standard which might most 'adequately' and 'feasibly' assure the elim-

[15] S. Rep. No. 91-1282, *supra* at 7, Leg. Hist. 147 (emphasis added).

[16] Senator Dominick was the sponsor of S. 4404, introduced on behalf of the Nixon Administration as a substitute for S. 2193 after it became apparent that the latter bill would be reported out of the Committee on Labor and Public Welfare. See Leg. Hist. 73, 510. On the Senate floor, the Dominick substitute was tabled by the narrow vote of 41 to 39 the day before S. 2193 was passed. Leg. Hist. 448-450. Senator Dominick's prominent role in the development of the legislation was noted by his fellow Senators. For example, Senator Javits observed that Senator Dominick's "efforts had a vital impact on the bill in terms of principle and fairness. . . ." Leg. Hist. 526. See also Leg. Hist. 527 (remarks of Senator Williams).

> ination of the danger would be the prohibition of the occupation itself. [Emphasis in original.]

In light of that concern, Senator Dominick proposed an amendment to delete from § 6(b)(5) the entire sentence setting forth the criteria for the promulgation of standards.[17]

Throughout the floor debate that ensued, Senator Dominick time and again cautioned his colleagues about what he perceived to be the problem with enacting § 6(b)(5) as drafted in the Committee bill. His remarks were consistently directed at the same concern: that the language proposed by the Committee could be read as requiring an absolutely risk-free workplace—a requirement which could be met only by shutting down numerous plants and facilities or, indeed, entire industries, and by banning numerous occupations.[18] He gave the following example (Leg. Hist. 423):

[17] Amendment No. 1054, Leg. Hist. 365-666.

[18] It is unrealistic to attempt, as [§ 6(b)(5)] apparently does, to establish a utopia free from any hazards. Absolute safety is an impossibility and it will only create confusion in the administration of this act for the Congress to set clearly unattainable goals.

> ○ ○ ○
>
> The difficulty of the language I am dealing with here and that I am trying to delete is the requirement that the Secretary, in establishing standards, must assure that there will not be any risk at all.
>
> * * *
>
> Almost any kind of occupation one can think of has something which is inherently hazardous simply by the fact that one is living and breathing and there is no way a criteria [sic] can be established so that an employee would not be faced with some risk for the period of his working life.
>
> * * *
>
> Let us take the case of a bus driver. There is no possible way that a bus driver for the rest of his life could be assured that

> How in the world, . . . during a working day of any one driving a bus . . . can we set standards that will make sure he will not have any risk to his life for the rest of his life? It is totally impossible for this to be put in a bill; and yet it is in the committee bill.

No concern of any other nature with regard to § 6(b)(5) was raised by any Senator. And while Senator Dominick declared that standards could not be expected "to produce a perfect environment" because "[n]o human effort can [do so] no matter how hard we try," he endorsed the principle that standards should nonetheless "be as effective as possible."[19] This view that the Secretary was to require what is "possible," not what is perfect, in fact reflected the consensus in the Senate. When that became apparent, the chief spokesmen on both sides of the aisle—Senators Williams, Javits and Dominick—translated that consensus into a modification of the Committee's version of § 6(b)(5) which was "agreeable to all."[20]

That modification was embodied in a substitute amendment, introduced by Senator Dominick, consisting of the language of § 6(b)(5) as eventually enacted. In the colloquy immediately preceding passage of that amendment, Senators Dominick and Williams confirmed the amendment's purpose (Leg. Hist. 502-503):

> he is not going to get regular exposure to these hazards. By the very nature of driving a bus over the road, no matter how many safety tires and signals are on the bus, it is a hazardous occupation.

Leg. Hist. 480-481. See also Leg. Hist. 345-346, 400-401.

[19] Leg. Hist. 376. See also Leg. Hist. 348 (remarks of Senator Saxbe, following colloquy with Senator Dominick in support of the latter's criticism of § 6(b)(5)): "[W]e still have to make every effort to make the place of employment not only as safe as possible, but also a place where the effectiveness is not impaired, the work is not impaired, by fear of dangerous fumes or accidents. . . ."

[20] Leg. Hist. 502.

MR. DOMINICK: . . .

What we were trying to do in the bill—unfortunately, we did not have the proper wording or the proper drafting—was to say that when we are dealing with toxic agents or physical agents, we ought to take such steps as are feasible and practical to provide an atmosphere within which a person's health or safety would not be affected. Unfortunately, we had language providing that anyone would be assured that no one would have a hazard, . . . no one would have any problem for the rest of his working life.

It was an unrealistic standard. As modified, we would be approaching the problem by looking at the problem and setting a standard or criterion which would not result in harm.

* * *

It is my understanding, if I may say so, that what we are doing now is to say that the Secretary has got to use his best efforts to promulgate the best available standards, and in so doing, that he should take into account that anyone working in toxic agents or physical agents which might be harmful may be subjected to such conditions for the rest of his working life, so that we can get at something which might not be toxic now, if he works in it a short time, but if he works in it the rest of his life it might be very dangerous; and we want to make sure that such things are taken into consideration in establishing standards; is that correct?

* * *

MR. WILLIAMS of New Jersey: That is exactly correct. . . . I think it is clear, the objectives have been stated, and it strengthens the objectives of standards that will protect against physical impairment and loss of function. [21]

[21] To the same end, the Committee version of § 6(b)(5) was revised to reflect the Congressional understanding that work of any nature necessarily has an impact on the human body and, ultimately, on life expectancy, and to seek to eliminate all such effects would amount to a ban on all employment. In this connection, Senator Dominick stated that "[s]imply being in a work environment where one is responsible for certain duties . . . produce[s] in most people impaired health, and it certainly diminishes life expectancy to some extent." Leg. Hist. 376. In the same vein, Senator Saxbe noted that "[w]orking itself is apt to diminish one's life expectancy. If one wants to stay home in bed, he probably will live longer than by standing at the plant and doing his job." Leg. Hist. 337.

Section 6(b)(5) was therefore modified to refer to "material impairment" rather than "any impairment," to delete the vague concept of "diminished life expectancy," and to apply only to toxic substances and harmful physical agents, rather than to every type of hazard that might be encountered on the job.

[22] Leg. Hist. 1092-1118.

As so amended, the Senate passed S. 2193 on November 17, 1970. The House, meanwhile, passed a substitute bill which contained no criteria to govern the setting of toxic substance standards.[22]

In conference, the House receded and accepted § 6(b)(5) precisely as the Senate had passed it. In receding, the House insisted on an amendment which became § 6(b)(6)(A). As described in the Conference Report, that section provides:

> that employers may petition for a temporary variance from an occupational health or safety standard if they are unable to comply with a standard for the following limited reasons: unavailability of professional or technical personnel or of necessary materials or equpment or because necessary construction or alteration of facilities cannot be completed in time. Economic hardship is not to be a consideration for the qualification for a temporary extension order.

H.R. Rep. No. 91-1765, 91st Cong., 2d Sess. 35 (1970), Leg. Hist. 1188. That the House insisted on this provision in accepting § 6(b)(5) is consistent with the fact that Congress understood § 6(b)(5) to call for the highest degree of protection of worker health, subject only to the impossibility of compliance by regulated employers.

b. A more general review of the legislative materials

relating to OSHA's enactment discloses that while Congress knew full well that the statute would require American industry to make large outlays of money, the legislative judgment was that the cost of adequate health and safety protection at the workplace should be recognized as a cost of doing business and should be reflected in the market place.

Senator Williams, who introduced the initial Senate version of the bill and served as floor manager, explained the economic philosophy of OSHA as follows: "We know the costs w[ill] be put into consumer goods but that is the price we should pay for the 80 million workers in America." [23]

Senator Eagleton, another proponent, added:

> The costs that will be incurred by employers in meeting the standards of health and safety to be established under this bill are, in my view, reasonable and necessary costs of doing business. Whether we, as individuals, are motivated by simple humanity or by simple economics, we can no longer permit profits to be dependent upon an unsafe or unhealthy worksite.[24]

The judgment that the costs of employee health and safety should be spread through the economy, rather than be borne by individuals, was well-expressed by Senator Yarborough, a co-sponsor of the bill in the Senate, in response to interest group complaints that such legislation would prove too expensive:

> One may well ask too expensive for whom? Is it too expensive for the company who for lack of proper safety equipment loses the service of its skilled employees? Is it too expensive for the employee who loses his hand or leg or eyesight? Is it too expensive for the widow trying to raise her children on meager allowance under workmen's compensation and social security? And what about the man—a good hardworking man—tied to a wheel chair or hospital bed for the rest of his life? That is what we are dealing with when we talk about industrial safety.
>
> We should have uniform standards so that no one industry would gain an advantage over any other industry. It would be far cheaper for our economy. It would save money in workmen's compensation premiums.
>
> We are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home after a day's work with their bodies intact. We are talking about assuring our American workers who work with deadly chemicals that when they have accumulated a few years seniority they will not have accumulated lung congestion and poison in their bodies, or something that will strike them down before they reach retirement age.[25]

The legislative materials reveal no dissent from the approach stated by these Senators. No legislator espoused the lower court's theory that the protection of worker health should be compromised on the basis of a cost-benefit assessment.

Congress was fully aware of the consequences of its determination. Congress realized, for example, that the additional costs of doing business that would be required to comply with OSHA standards might threaten the viabil-

[23] Leg. Hist. 444.

[24] Leg. Hist. 1150-1151.

[25] Leg. Hist. 510. See also, e.g., Leg. Hist. 1030-1031 (remarks of Representative Dent):

> Although I am very much disturbed over adding new costs to the operation of our production facilities . . . I would say there is a greater concern and that must be for the production men who do the producing—the men who work in the service industries and the men and women who daily go out and keep the economy moving and make it safe for all of us to live and to work and to be able to prosper in it.

ity of a great number of small employers. The legislative response was not, however, to dilute the mandate of § 6(b)(5) (or the other substantive provisions of the Act) or to exempt small employers from its reach. Rather, Congress established in § 28 of the Act [26] a program to provide loans to small businesses to be used to achieve compliance with the standards promulgated by the Secretary. Senator Dominick stated the intent of § 28 in these words:

> [The small business program] permits the Secretary to make loans to small businesses wherever the standards that are set by the National Government are so severe as to have caused a real and substantial economic injury. Under those circumstances the Secretary is entitled, through the Small Business Administration, to make loans to those businesses to get them over the hump, because of the need for the new equipment, or because of new conditions within the shop, which would permit them to continue in operation.
>
> I think this is a very significant and important provision for minimizing economic injury which could occur if the bill resulted in situations which would have very serious effects on businesses.

Leg.Hist. 525.

Congress thus expected whatever costs were necessary to provide the protections called for by the Act to be borne through the market mechanism as part of the true costs to society of the production of certain goods.

3. On the facts found by the Secretary, the standard he promulgated is the one required by § 6(b)(5). Given that benzene is a known leukemogen, which the "best available evidence" shows to be dangerous at any level of exposure, and to which thousands of employees are exposed on a regular basis, the Secretary's duty under § 6(b)(5) is unambiguous: subject only to the constraint of feasibility, he "shall set *the* standard which *most adequately assures* . . . ,

[26] As amended, 42 U.S.C. § 3142-1, 15 U.S.C. § 636(b)(5).

on the basis of the best available evidence, that *no employee* will suffer material impairment of health or functional capacity *even if* such employee has regular exposure to the . . . [regulated substance] for the period of his working life." Here, the only standard which can provide the "assurance" required by the statute to each of the 30,000 employees who are regularly exposed to airborne benzene, and as a result face a prospect of contracting leukemia, is one which requires that exposure to be reduced to the lowest level feasible.

B. Section 3(8), The Definitional Provision Relied Upon By The Court Below, Does Not Provide For Any Departure From The Specific Directives Of § 6(b)(5).

The court below nonetheless held that the Secretary was without authority to promulgate this standard, because he did not provide an "educated estimate" or "quantification" of the number of lives that would be saved and thus did not establish a basis for comparison of the costs and benefits of the standard. The court recognized that the Secretary had found, based on the conclusion of NIOSH and the general agreement of the experts who testified, that, in the court's words, "benzene was unsafe at any level and . . . that exposures to lower levels of [benzene] would be safer than exposure to higher levels." Pet. App. at 17a-18a. The court also acknowledged, and did not overturn, the Secretary's finding that, again in the court's words, "risk quantification"—i.e., estimation of the number of lives at stake—"at low exposure levels and therefore estimates of expected benefits from the standard cannot presently be made. . . ." Pet. App. at 19a, n. 23.[27] Nevertheless, the court ruled that

[27] While accepting OSHA's finding, the Court stated that (Pet. App. at 19a, n. 23):

> Although OSHA's assertion that present knowledge is insufficient to construct a valid dose-response curve for benzene may be correct, the record reflects that preliminary assessments

the Secretary could not require that the permissible exposure limit be reduced to an admittedly safer level "[u]ntil such estimates are possible." Pet. App. at 21a.[28]

The court below could not and did not reconcile its holding with the directives in § 6(b)(5). See Pet. App. at 15a-16a, 21a. The court apparently believed it was relieved of that burden by § 3(8) of the Act. Section 3(8), a subsection of

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are now being made and that valid extrapolations will be possible as more is known about the effects of past exposure at higher levels.

Contrary to the court's observation of what the record "reflects," no witness for any party suggested that reliable data as to past exposures of groups of employees were likely to be discovered; nor did any party make that representation to the court below. As the Secretary found, "it is extremely difficult to reconstruct and define employee exposures retrospectively." Pet. App. at 182a. That finding is borne out by the fact that even the most extensive and carefully conducted studies of the effects of past benzene exposure lack data as to the levels and duration of exposures involved. See Pet. App. at 104a-105a. Moreover, even if such data were available, the estimates required by the court of appeals still could not be made, due to the absence of other necessary data such as the actual number of leukemia cases which have resulted from past exposures. See pp. 9-10 and note 4, *supra*. The court of appeals recognized that in the absence of any data concerning past human exposure sufficient to provide the information required by its opinion, the only way to seek that information without "wait[ing] until deaths occur as a result of exposure at levels below 10 ppm" is to await reliable studies of animal exposure. See Pet. App. at 20a-21a. But as the court acknowledged, scientists have encountered difficulties in inducing benzene leukemia in animals (Pet. App. at 20a, n. 25); and consequently there is no prospect that this route will yield the information which the court held the Secretary must obtain.

[28] The court stated that this ruling "does not mean that OSHA must wait until deaths occur as a result of exposure at levels below 10 ppm before it may validly promulgate a standard reducing the permissible exposure level." Pet. App. at 20a. But the record does not establish any other basis on which the court's required estimates could realistically be made. See note 27, *supra*.

the Act's "Definitions" provision, reads as follows:

> The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

The court construed the words "reasonably necessary" in § 3(8) to require the Secretary to perform a cost-benefit assessment as a prerequisite to the promulgation of a toxic substance standard. By the logic of the court's opinion, that requirement would obtain regardless of anything in § 6(b)(5) to the contrary. But as we now show, § 3(8) embodies no such departure from the mandate of § 6(b)(5).

The words "reasonably necessary" cannot be understood without reference to the words which follow them in § 3(8): "to provide safe or healthful employment and places of employment." The latter words in turn derive their meaning from the more specific objectives and criteria set forth in the Act. In the case of a toxic substance, that meaning is stated in § 6(b)(5): employment and places of employment are "healthful" where there is the most adequate assurance feasible that no employee will suffer a material impairment of health from exposure to the toxic substance, even if the exposure is regular and prolonged. Thus, as regards standards regulating toxic substances, § 3(8) can have no meaning different from § 6(b)(5).[29]

However construed, § 3(8) cannot override the explicit

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[29] As this Court has frequently held, provisions which assert that regulations are to be "necessary" or "appropriate" to achieving a statutory objective are not to be construed as imposing a discrete substantive requirement. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973); *Thorpe* v. *Housing Authority*, 393 U.S. 268, 277, 280-281 (1969); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 748-749 (1972); *United States* v. *Bacto-Unidisk*, 394 U.S. 784, 786-787 and n. 2, 791-792 (1969).

directives which Congress set forth in § 6(b)(5).

> "General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment."

Ginsberg & Sons v. *Popkin*, 285 U.S. 204, 208 (1932).[30] Particularly is that so here, where the legislative history shows that Congress understood § 6(b)(5) to be the exclusive enumeration of the factors governing the setting of toxic substance standards. See *supra* at 17-23. Thus, for example, S. 2193, the bill to which § 6(b)(5) was added in the Senate, contained the provision which became § 3(8).[31] Yet, the Senate debated at length the question whether § 6(b)(5), before its final amendment, might be read to require "absolute health and safety in all cases." See *supra* at 18-22.[32] Had Congress understood § 3(8) as the Fifth Circuit does, that entire debate would have been beside the point. The lesson to be drawn is that Congress did not intend § 3(8) to have the significance ascribed to it by the court below.

Even if the "reasonably necessary" language of § 3(8) were assumed to have some independent meaning which could override the terms of § 6(b)(5), there is no basis for attributing to it the particular meaning announced by the court below: that a standard can be "reasonably necessary" only if it can survive a "cost-benefit" evaluation. The asserted basis for this interpretation was the Fifth Circuit's *Aqua Slide* decision construing requirements of the Consumer Product Safety Act, which the court below deemed

[30] See also *FPC* v. *Texaco*, 417 U.S. 380, 394-395 (1974); *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 488-489 (1947).

[31] Leg. Hist. 204, 235.

[32] Senator Javits described another bill (S. 2788, which he had introduced) as containing "no criteria for standards at all" (Leg. Hist. 197), even though that bill contained a provision virtually identical to § 3(8) (Leg. Hist. 31, 35).

to be "precisely similar" to the requirements of OSHA. Pet. App. at 15a. But far from being "precisely similar," the language and purpose of the CPSA provisions discussed in *Aqua Slide* are fundamentally different from that of § 3(8), OSHA, and this difference highlights the error of the result reached by the court below.[33]

The provisions at issue in *Aqua Slide* were expressly intended to govern the CPSA standard setting process. Section 7(a) of the CPSA limits the authority of the Consumer Product Safety Commission ("CPSC") to promulgate standards as follows:

> Any requirement of such a standard shall be reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product.

And § 9(c)(2)(A) sets forth a finding which the CPSC must make before promulgating a standard:

> (2) The Commission shall not promulgate a consumer product safety rule unless it finds (and includes such finding in the rule)—
>
> (A) that the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product;....

As the court in *Aqua Slide* recognized, the source of the required cost-benefit assessment under CPSA is the term "unreasonable risk," not the term "reasonably necessary." 569 F.2d at 839. The concept of "unreasonable risk" as used in the CPSA inherently involves some balancing between "costs" and "benefits": it requires on the one hand, an assessment of the nature and extent of the hazard posed by a particular consumer good; and, on the other, an evaluation of the effect of removal of the hazard upon the utility

[33] See McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 Geo. L. J. 729, 786-787 (1979).

and cost of the good. In that balance lies the judgment whether the risk is "reasonable." See *Forester* v. *Consumer Product Safety Commission*, 559 F.2d 774, 789 (D.C. Cir. 1977).

The legislative history of CPSA directly confirms this interpretation. See H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 33 (1972); S. Rep. No. 92-749, 92d Cong., 2d Sess. 6, 14-15 (1972). What is more, the statute itself expressly sets forth the factors that are to be considered in weighing the costs and benefits of a CPSA standard. The statute provides that the CPSC, "prior to promulgating" a standard, "shall consider" and "shall make appropriate findings" as to, *inter alia*: "the degree and nature of the risk of injury the rule is designed to eliminate or reduce"; and "the need of the public for the consumer products subject to such rule, and the probable effect of such rule upon the utility, cost, or availability of such products to meet such need." § 9(c)(1)(A), (C).

The court below was therefore wrong in concluding that because a cost-benefit evaluation is required before a CPSA standard can be promulgated, the same must be true of an OSHA toxic substance standard. There is such a requirement under CPSA because the language and history of the statute call for it; the language and history of OSHA respecting toxic substance standards lead to the opposite conclusion. That difference in result is no mere accident of statutory draftsmanship. It stems from the Congressional perception that the problems addressed by the two statutes are different in nature.

The problem addressed by CPSA was viewed by Congress as involving a mix of countervailing consumer interests. See, *e.g.*, CPSA § 9(c)(1)(C). The fact that a consumer product may be dangerous is not alone sufficient to justify its regulation, since such regulations might well adversely affect "the product's utility, cost and availability to the

consumer."[34] For example, Congress recognized that while sharp knives are dangerous, consumers would not gain from a regulation requiring that knife blades be dulled.[35] Congress directed the CPSC to engage in the process of balancing these competing consumer interests before regulating any consumer product.

Congress saw the problem of worker exposure to toxic substances in a different light. Congress viewed such exposure as intolerable where it could possibly be avoided. Section 6(b)(5) had the singular purpose of protecting against such exposure. Congress chose not to balance that purpose against the costs of achieving that protection. The language of § 6(b)(5) translates that judgment into a mandate to the Secretary to achieve the highest degree possible of employee protection from toxic substances.

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[34] H.R. Rep. No. 92-1153, *supra* at 33.

[35] S. Rep. No. 92-749, *supra* at 6-7.

CONCLUSION

For the reasons stated herein, the decision of the Fifth Circuit should be reversed insofar as it invalidates the reduction in the permissible exposure limit and the provisions related thereto.

Respectfully submitted,

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